IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.3463 OF 2004

IN

FIRST APPEAL NO.288 OF 2004

Shri Dnyanshwar Laxman Bankar .. ..Applicant

Versus

1.Shri Prakash Kashinath Chandole & Ors. ..Respondents

Mr.Ulhas Kerkar for applicant

Ms.Leena R.Patil i/b P.M.Pradhan for respondents

Mr.R.A.Thorat for respondent nos.2 and 3

CORAM : P.V.KAKADE, J.

DATE : 10TH DECEMBER, 2004.

1. This is an application filed by the respondent in the appeal who is original defendant seeking to vacate the order passed by this court in C.A. No.449 of 2004 dated 18.6.2004.

2. I heard the learned counsel for both the parties. Perused the record.

3. The present opponent who is appellant has filed Civil Application bearing C.A.No.449 of 2004 against the present applicant for obtaining order whereby restraining the applicant from dealing with or disposing of the suit property in any manner. This court allowed the said application by order dated 18.6.2004 issuing injunction pending the appeal. The applicant states that on 16.10.2001 the suit for specific performance was partly decreed and relief sought for specific performance was refused and refund of Rs.2 lacs was directed to be paid with interest. The applicant further states that on 18.12.2001 C.A.No.1482 of 2002 came to be filed in F.A.No.288 of 2002 which was admitted by this court on 4.3.2002. C.A.No.1482 of 2002 was filed by the appellant which was rejected by this court. Thereafter another application came to be filed bearing C.A.No.1780 of 2002 by the appellants, stating out that the public notice was published in daily "Lokmat" dated 24.8.2001 for the sale of the property and therefore, the present opponent requested the court

to grant injunction for not to create any third party interest. In that application the opponent/appellant had an opportunity to take up the said plea in his earlier civil application. He tried to obtain an interim injunction on the basis of the facts but failed to get the reliefs from this court and this court rejected that application with speaking order dated 18.6.2002 and civil application No.1780 of 2002 came to be rejected by the said order.

. Thereafter Civil Application No.2701 of 2002, which was filed on 6.5.2002 by the opponent/appellant on the same ground i.e. public notice was published by one Advocate Rathi on behalf of the third person Mr.Vilas Namdeo Dhivare. On the basis of that notice the appellant again applied for the same relief by C.A.No.2701 of 2002. However, it came to be dismissed for default by order dated 5.10.2002. Thereafter the opponent again moved the C.A.No.449 of 2004 on 9.7.2003 for seeking similar reliefs on similar ground stating that public notice is issued, which was challenged under the circumstances. The ld. Singal Judge (A.S.Oka, J.) by order dated 18.6.2004 upheld the ground that there

was a public notice and therefore, issued injunction, which is sought to be vacated by the present application.

4. On hearing both the sides and perusing the entire record including the previous application and orders thereunder, it appears from para 2 of the impugned order that the opponent refers to public notice dated 17.5.2002 and in view of the said notice it was held that the opponent was entitled for an injunction. At the time of adjudication of this application, the appellant did not point out to the court that his earlier civil application No.2701 of 2002 was dismissed on the very same changed circumstance. In view of this position the order was obtained by suppressing the material fact and therefore it is liable to be vacated.

5. It is also submitted that the applicant has already executed an agreement to sale with one Rutu Builders and Developers in the year 1966 and subsequently executed a registered a Development Agreement and Power of Attorney in favour of one Ganore on or before 11.12.2003. Later on the development activities have already taken place and further third party rights in respect of the said

property are also created by the developer to the knowledge of the applicant/respondent. Therefore it is submitted that all these developments are within the knowledge of the present opponent/appellant and the impugned land is already alienated much prior to ad-interim reliefs obtained by the opponent on 18.6.2004 therefore since the properties are alienated and further alienation have taken place and the agreements are executed prior to injunction and therefore the order passed on 18.6.2004 is rendered infructuous and therefore, liable to be vacated.

6. This position could not be successfully disproved on behalf of the present opponent and fact remains that the record is sufficient to show that already third party interest have been crated prior to the impugned order dated 18.6.2004. As noted earlier the perusal of the orders in C.A.No.1780 of 2002 and C.A.No.1482 of 2002 show that the application of the present opponent came to be rejected and therefore, there is no doubt whatsoever that in the course of the application, the opponents suppressed the fact from the court that there was a public notice therefore the injunction granted on that ground has to be vacated.

7. In view of this position I am inclined to allow the application with rider as follows :

> The application is allowed in terms of prayer clause (a). However, it is clarified that all the acts and activities of the present applicant/respondetn shall be subject to final out come of the appeal pending before this Court.
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> With this direction the application stands disposed of with no order as to costs.